IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.474 OF 2005

WITH

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Gurudeo Forging Pvt. Ltd.
& Anr. .. Appellants

vs.

Kishor V. Daryanani .. Respondent.

V.B.Ghorpade for the Appellant.

Mr.P.B.Kapadia for the Respondent.

CORAM : A.S.OKA, J.

DATED : 12th April, 2005.

P.C. :

1. Admit.

2. The Respondent in all the three Appeals from Order waives service. Taken up for hearing forthwith. These three Appeals from Order can be disposed of by a common judgment.

3. For the sake of convenience reference is

made to the facts of the case in Appeal from Order No.474 of 2005. The Appellants are the original Defendants and the Respondent is the original Plaintiff. A summary suit under Order 37 of the Code of Civil Procedure, 1908 was filed by the Respondent against the Appellants for a decree in the sum of Rs.12,870/- together with future interest on Rs.9,490/- at the rate of 18% per annum from the date of filing of the suit till realisation. The suit is based on a bill of exchange. According to the case of the Respondent,the Bill of Exchange was drawn for valuable consideration by the Appellant No.1 and delivered to the Respondent. The Bill of Exchange was drawn on the Appellant No.2. The Bill of Exchange was presented to Appellant No.2 for acceptance and the Appellant No.2 accepted the same for payment.

4. It is not in dispute that unconditional leave to defend was granted in favour of the Appellants by the trial Court. However, the Appellants did not defend the suit and therefore ex-parte decree came to be passed against the Appellants on 23.3.2004. A Notice of Motion was taken out by the Appellants for setting aside the ex-parte decree. In the said Notice of Motion a

case was made out that the Appellant No.1 has become a sick company and proceedings are pending before the B.I.F.R. in respect of the Appellant No.1 Company. By the impugned Judgment and Order dated 23.8.2004, the learned trial Judge partly allowed the Notice of Motion. The learned trial Judge ordered that the ex-parte decree as against Appellant No.1 will stand set aside. However, the prayer made by Appellant No.2 was dismissed.

5. The learned Counsel appearing for the Appellants submitted that the Appellant No.2 was a Director of Appellant No.1 and therefore if proceedings are pending before the B.I.F.R. against the Appellant No.1,the decree ought to have been set aside as against the Appellant No.2 also. He submitted that the decree deserves to be set aside as unconditional leave was earlier granted.

6. The learned Counsel for the Respondent submitted that the liability of the Appellant No.2 is independent as the acceptor of the Bill of Exchange and a suit could have been filed independently as against the Appellant No.2 by the Respondent. He submitted that the Appellants have not chosen to defend the suit and therefore no case

is made out for setting aside the ex-parte decree against the Appellant No.2.

7. It is an admitted position that unconditional leave to defend was granted in favour of the Appellants. However, they did not avail of the said leave. The decree passed against the Appellant No.1, who is the drawer of the Bill of Exchange has been set aside. Considering these facts the learned trial Judge ought to have adopted a liberal approach and set aside the decree passed against the Appellant No.2.

8. While dealing with application under Order IX Rule 13 of the Code of Civil Procedure,1908 the Court has power to impose conditions for setting aside ex-parte decree. In Appeal from Order No.474 of 2005 the decree is passed in the sum of Rs.13,999.50 with interest thereon at the rate of 8% per annum on a sum of Rs.9490/- from 23.6.2003 until payment. Considering the conduct of the Appellant No.2 he will have to deposit the principal amount of Rs.13,999.50 in the trial Court as a condition for setting aside the ex-parte decree.

9. The Appeal from Order No.475 arises out of

ex-parte decree passed in Suit No.3113 of 2003. In the said suit decree is for the sum of Rs.52,219.90 with interest at the rate of 8% per annum from 23.6.2003 on the sum of Rs.47,450/-. Considering the facts of the case in this Appeal, the Appellant will have to deposit a sum of Rs.30,000/- in the trial Court within a reasonable time.

10. The Appeal from Order No.476 of 2005 arises out of decree passed in Suit No.3173 of 2003. Decree is passed in the said suit in the sum of Rs.28,295.50 with interest thereon at the rate of 8% per annum on sum of Rs.19,490/-. In this case the Appellant will have to deposit the amount of Rs.28,295.50 as a condition for setting aside the ex-parte decree.

11. Hence I pass the following order:

i) The Appeal from Order No.474 of 2005 is partly allowed. The Decree passed in the Summary Suit No.3114 of 2003 will stand set aside subject to the condition of Appellant No.2 depositing in the trial Court the sum of Rs.13,999.50 (Rupees Thirteen Thousand Nine Hundred Ninety Nine & paise Fifty Only)

within a period of eight weeks from today. If the said amount is not deposited within the stipulated time, the impugned judgment and Order will stand. If the amount is deposited within the stipulated time, the learned trial Judge will invest the said amount in fixed deposit in some Nationalised Bank and the fixed deposit shall be renewed from time to time till the disposal of the suit. In case the Appellant deposits the said amount within the stipulated time, the learned trial Judge will permit the Appellant No.2 to file the written statement on or before 8.7.2005. It is made clear that no further time will be granted to the Appellant No.2 to file written statement.

ii) The Appeal from Order No.475 of 2005 is partly allowed. The Decree passed in the Summary Suit No.3113 of 2003 will stand set aside subject to the condition of Appellant No.2 depositing in the trial Court the sum of Rs.30,000/- (Rupees Thirty Thousand Only) within a period of eight weeks from today. If the said amount is not deposited within the stipulated time, the impugned judgment

and Order will stand. If the amount is deposited within the stipulated time, the learned trial Judge will invest the said amount in fixed deposit in some Nationalised Bank and the fixed deposit shall be renewed from time to time till the disposal of the suit. In case the Appellant deposits the said amount within the stipulated time, the learned trial Judge will permit the Appellant No.2 to file the written statement on or before 8.7.2005. It is made clear that no further time will be granted to the Appellant No.2 to file written statement.

iii) The Appeal from Order No.476 of 2005 is partly allowed. The Decree passed in the Summary Suit No.3173 of 2003 will stand set aside subject to the condition of Appellant No.2 depositing in the trial Court the sum of Rs.28,295.50 (Rupees Twenty Eight Thousand Two Hundred Ninety Five & paise Fifty Only) within a period of eight weeks from today. If the said amount is not deposited within the stipulated time, the impugned judgment and Order will stand. If

the amount is deposited within the stipulated time, the learned trial Judge will invest the said amount in fixed deposit in some Nationalised Bank and the fixed deposit shall be renewed from time to time till the disposal of the suit. In case the Appellant deposits the said amount within the stipulated time, the learned trial Judge will permit the Appellant No.2 to file the written statement on or before 8.7.2005. It is made clear that no further time will be granted to the Appellant No.2 to file written statement.

iv) The execution of the ex-parte decrees passed which are the subject matter of all the three appeals is stayed for a period of eight weeks from today.

Parties and the concerned Court to act on the authenticated copy of this order.

(A.S.Oka, J.)